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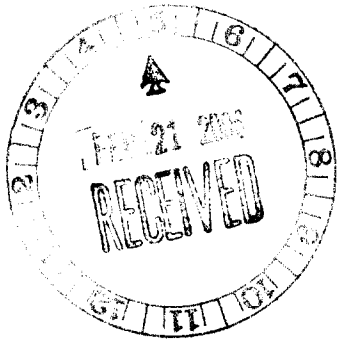

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34797

New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Petition For An Exemption From 49 U.S.C. § 10901 To Acquire, Construct And Operate As A Rail Carrier On Tracks and Land in Wilmington and Woburn, Massachusetts

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Petitioner's Consolidated Reply To Comments

On December 5, 2005, New England Transrail, LLC ("NET") filed its Petition for an Exemption from the application requirements of 49 U.S.C. § 10901 ("Petition"). A number of comments have been submitted by interested parties in response to the Petition. Most of those comments focus on a few common issues. To address the main issues raised by the commenters, NET hereby files this Consolidated Reply to the comments filed by the Massachusetts Department of Environmental Protection ("MADEP"), the National Solid Wastes Management Association, et al. ("NSWMA"), the Town of Wilmington ("Wilmington"), and the New Jersey Department of Environmental Protection et al. ("NJDEP").[1] NET believes this Consolidated Reply will aid the Board by providing a "road map" to the various issues raised by the commenters and NET's responses.

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[1] NET recognizes that the Board's rules do not permit replies to replies filed by other parties as a matter of course. Accordingly, in a separate letter filed today with the Secretary, NET has requested leave to file this reply.

As explained in detail in its Petition, NET has made a substantial effort to address all of the questions raised by the Board in its May 3 order dismissing NET's original Petition without prejudice. New England Transrail, LLC, STB Finance Docket No. 34391 (STB served May 3, 2005). NET retained technical consultants to assist in that effort, and their verified statements are attached to the Petition. In addition, NET met with representatives of MADEP in September to explain the details of the project in person, and offered, in writing, to enter into a voluntary agreement pursuant to which MADEP could exercise inspection and enforcement authority at the NET Facility. Thus far, MADEP has declined to consider NET's offer to reach a voluntary arrangement with MADEP. Nevertheless, NET remains willing to work with MADEP, and with all other interested parties in the Wilmington and Woburn communities, to address any concerns they may have with respect to the proposed project.

The major issues raised by the commenters can be broken into four separate categories. Those issues are addressed below.

1. NET Will Meet the Standards To Be A Rail Carrier.

MADEP, NSWMA and the NJDEP all argue that NET's Petition for an exemption from § 10901 should be denied because NET is not, at this moment, a rail carrier. MADEP at 12; NSWMA at 14; NJDEP at 8-9. That argument ignores the fact that NET's Petition specifically requests, as part of this proceeding, that it be granted the "authority to operate as a common carrier by rail." Petition at 5. In support of its request, NET described the legal standard for such status and described how it will meet those tests if its Petition is granted. Id.

The commenters cite no authority in the Board's regulations or decisions that precludes NET from making a "common carrier" request in the same pleading in which NET requests authorization to acquire, construct, and operate the trackage and intermodal transload facility at issue. To the contrary, there is ample Board precedent for allowing a noncarrier to seek carrier status in the same proceeding in which it seeks to acquire a rail line. See, e.g., Kaw River R.R., Inc. - Acquisition and Operation Exemption - the Kansas City Southern Ry. Co., 2005 WL 1024485 (S.T.B.), Finance Docket No. 34509 (S.T.B. served May 3, 2005) (citing cases). It is certainly more efficient for the Board to consider both requests simultaneously because it will help the Board to know the details of NET's proposed operations before ruling upon its common carrier request.

MADEP and NSWMA also argue that NET has not provided sufficient information for the Board to grant NET's request to operate as a common carrier. NSWMA asserts that "NET concedes" that its proposed connections with the MBTA and B&M lines are "purely speculative," and MADEP asserts that "NET provides no information on the likelihood of striking a deal with either B&M or the MBTA or on a timetable for putting such agreements in place." NSWMA at 8. MADEP at 14. MADEP also questions whether NET has shown that it can hire the appropriate personnel and acquire and operate the appropriate equipment. MADEP at 14. Similar arguments regarding personnel and equipment are raised by the NJDEP. NJDEP at 8.

Those assertions simply ignore the facts that NET set forth in the Petition and the sworn statements attached thereto. There is nothing "speculative" about NET's plans to execute agreements with the B&M and MBTA and to acquire and operate the necessary equipment and to hire the appropriate personnel. Attached to NET's Petition is the

Verified Statement ("V.S.") of Robert Jones, III, who certified that the necessary agreements would be executed with B&M and MBTA. See Petition at 6; Jones V.S. at ¶ 3. There is nothing speculative about those plans, because the law requires B&M and MBTA to execute such agreements.[2] Mr. Jones also certified that, if authorization is granted, NET itself, as a rail carrier, would acquire the railroad equipment and construct and operate the facility, rather than entering into a contract arrangement with an existing rail carrier to provide those services. Jones V.S. at ¶ 7. Obviously, however, NET cannot finalize its plans before the Board grants it authorization to do so. None of the commenters has offered any evidence, beyond mere conclusory assertions, to rebut Mr. Jones' statements.

Because NET's Petition specifically requests authority to become a railroad, and because NET meets the requirements for common carrier status as described in the Petition, the commenters' opposition to the Petition based on NET's existing status as a noncarrier is without basis.

2. NET Will Be Engaged In "Transportation" Activities, Not "Solid Waste Processing" Or "Recycling" Activities.

Almost all of the commenters argue strenuously that NET's proposed facility is nothing more than a "solid waste processing facility." However, those arguments ignore the facts. The record shows that NET proposes to construct an intermodal transload facility that will facilitate the shipment of a broad array of commodities in one continuous intermodal rail movement. The types of activities in which NET proposes to engage at

[2] See, e.g., 49 U.S.C. § 10742; 49 U.S.C. § 11103; Cleveland, C., C. & St. L. Ry. Co. v. U.S., 275 U.S. 404 (1928); SMS Rail Service Inc.—Petition for Declaratory Order, STB Finance Docket No. 34483-0 (STB served January 24, 2005).

the facility are analogous to those that Congress, the courts, and the Board itself have determined to be "transportation" under applicable law. There is longstanding precedent evidencing a broad interpretation of the Board's preemptive and exclusive jurisdiction over facilities and services, ancillary to rail carriage, that facilitate the movement of goods by rail.

Since the passage of the Hepburn Act in 1906, the definition of transportation has included "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange." Act of June 29, 1906, ch. 3591, 34 Stat. 584. The Hepburn Act brought other businesses that transport goods for a fee, such as terminals, storage facilities, pipelines, ferries and others, under the jurisdiction of the Interstate Commerce Commission ("ICC"). "Thus, Congress clearly recognized that services such as [grain elevators that processed, cleaned, mixed, and transloaded grain ancillary to the rail service] were services in transportation," although they were conducted by private grain companies. See ICC v. Diffenbaugh, 222 U.S. 42, 44 (1911); see also Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co. v. Dettlebach, 239 U.S. 588, 594 (1916) ("[F]rom this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier.")

In adopting the Interstate Commerce Commission Termination Act ("ICCTA") in 1995, when it abolished the ICC and replaced it with the Board, the Congress retained the broad definition of "transportation" that included all facilities and services related to the movement of goods by rail. 49 U.S.C. § 10102(9). Since that time, in addition to

"services related to the movement" of goods, "transportation" has also included "any yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property . . . by rail." Id. Contrary to the commenters' assertions in this proceeding, the intent of the Congress in passing the ICCTA was to broaden the federal jurisdiction over railroads and their activities. Their object was to free railroads, even smaller intrastate operations, from inconsistent, expansive, and expensive state regulation. See S. Rep. 104-176, *5-6, 104th Congress 1st Session, 1995 WL 701522.

As demonstrated in the Petition, the courts that have interpreted the scope of the Board's jurisdiction under the ICCTA, and indeed the Board itself, have uniformly held that, when conducted by rail carriers, the types of intermodal transloading operations to be conducted at NET's proposed facility constitute "transportation" under the statute. Petition at 19-20; Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) ("[T]he proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the [Board's] exclusive jurisdiction over 'rail transportation.'"); Coastal Distribution LLC v. Town of Babylon, No. 05-CV-2032, slip op., 2006 WL 270252 (E.D.N.Y. January 31, 2006) (holding that C&D storage and transloading facility was part of rail transportation) ; Canadian National Railway, et al. v. City of Rockford, et al., 2005 WL 1349077 (E.D. Mich. June 2, 2005) (activities occurring at the C&D transload facility "appear to meet the definition of 'transportation by rail carrier,' which would cause [city's] regulations to be preempted."); Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 239 (D. Mass 2004); Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647, *6 (N.D. Ga. 1997) ("[T]he

instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carrier' over which the STB is given exclusive jurisdiction."); Green Mountain Railroad Corporation -- Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002); Joint Petition for Declaratory Order--Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001); cf. Hi Tech Trans, LLC -- Petition for Declaratory Order -- Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB Served August 14, 2003) ("There is no dispute that Hi Tech's transloading activities are within the broad definition of transportation.").

Instead of responding to the legal analysis set forth in NET's Petition, the commenters fall back on name calling. NSWMA calls the NET facility a "solid waste processing facility" at least 16 times in its comments. See, e.g., NSWMA at 9, 10, 13, 14, and 20. NJDEP characterizes NET's facility as a "transfer station" and "recycling" center. NJDEP at 10 and 12. Indeed the commenters devoted a large proportion of their analysis to addressing the regulatory requirements applicable to solid waste processing and transfer facilities. Because the facts in the record show that NET is proposing to construct and operate an intermodal transload facility that is integral to transportation of commodities by rail, the requirements cited by the commenters have no application. Merely calling NET's facility a "solid waste processing facility" does not turn it into one.

Because NET will operate as a common carrier, the demand for NET's transportation services will ultimately be driven by the free market. In its Petition, NET explained that waste is only one of several commodities that the transloading facility is intended to handle. Petition at 10-11. Contrary to NSWMA's assertion that NET never

explained what percentage of the total commodities would be waste, the Verified Statement of Robert Jones, attached to the Petition, states that approximately 50% of the total commodities would be materials other than waste.[3] None of the commenters has tendered a single witness to rebut the testimony of Mr. Jones that NET has engaged in discussions with a number of shippers to transport the variety of commodities that are listed in the Petition and in his Verified Statement. Petition at 10; Jones V.S. at ¶ 4. NET's business plan is based on handling commodities other than waste, as the description of the project makes clear. Petition at 10-11; Jones V.S. at ¶¶ 2, 4, 9, 11, 12.

NSWMA repeatedly asserts that NET's proposed facility will be performing some of the same activities that NSWMA's members perform at their solid waste transfer and recycling facilities. NSWMA at 16-20. Because NSWMA's members operate "solid waste processing facilities," NSWMA therefore concludes that NET's facility must be a "solid waste processing facility." NSWMA at 16-20. That argument ignores longstanding precedent. A similar argument was addressed in United States v. Union Stockyard, 226 U.S. 286 (1912), where a railroad sought to avoid responsibility for feeding and caring for cattle it was transporting. The Court held that such ancillary activities were part of rail transportation and therefore subject to the exclusive jurisdiction of the Board's predecessor, the ICC. It was not disputed that similar, if not identical, feeding activities were being performed by nearby stockyards. Just because stockyards were engaged in the behavior, however, did not remove those activities from

[3] Jones V.S. at ¶ 4. NSWMA ignores that fact, even though Mr. Jones said exactly the same thing in his March 2005 verified statement which NSWMA quotes at 13, 16.

the definition of "rail transportation," as interpreted by the Court. The same analysis applies here.

Unlike solid waste processing facilities or recyclers, NET will never take title to any of the materials passing through its facility, and will not be in the business of "processing" them for resale into the local market. Petition at 12; Jones V.S. at ¶¶ 16, 19. To the contrary, the shredding and baling of materials will be done solely to (1) facilitate their transfer into railcars and their subsequent carriage to the end users in one continuous intermodal rail movement; (2) minimize damage to railcars; and (3) maximize the utilization and safety of railcars. Petition at 11-12; Jones V.S. at ¶¶ 13, 15; Ryan V.S. at ¶¶ 5-12. Consequently, the shredding and baling activities are clearly part of the loading and unloading that have long been determined to be integral to transportation. See Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446 (1946) (loading, storing, and unloading services at a warehouse considered "transportation").

None of the commenters cites a single decision by the Board or any court in which the Board denied jurisdiction when a rail carrier sought to construct and operate an intermodal transload facility, such as the one proposed by NET. Instead, the commenters rely upon a handful of cases that were decided under facts easily distinguishable from those in the record of this case.

For example, the commenters rely heavily on three cases holding that bulk distribution centers operated by third parties on land leased from the railroad were not subject to the Board's jurisdiction or federal preemption. See Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1329 (11th Cir. 2001); CFNR Operating Co. v. City of American Canyon, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003); Growers

Marketing Co. v. Pere Marquette Ry., 248 I.C.C. 215, 226-27 (1941). However, those cases all are distinguishable because, unlike NET, the businesses operating the facilities were not themselves common carriers, but customers of the railroads who wished to locate their distribution centers as close to the point of delivery as possible. See Canadian National Ry. Co. v. City of Rockwood, Docket No. COV/04-40323, 2005 WL 1349077 (E.D. Mich. June 1, 2005).

Another case on which the commenters rely heavily, Hi-Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004), is also distinguishable, for two reasons. First, central to the court's decision in that case was the fact that Hi-Tech, the operator of the facility, was not a railroad and had previously withdrawn its application for carrier status. Hi-Tech, 382 F.3d at 305. The court conceded that the activities undertaken at the transload facility could be considered transportation.[4] Id. at 308. However, the facts demonstrated that Hi-Tech was essentially a waste processing and hauling company that contracted for the shipment of construction and demolition waste ("C&D") to its facility by trucks, processed it, and loaded it onto railcars owned by the Canadian Pacific Railroad ("CPR"). Hi-Tech was only permitted to operate its facility under a license agreement with the railroad. Id. at 299, 308. Under this agreement, Hi-Tech, the non-railroad third party, was responsible for the construction and maintenance of the facility and subject to liability for the operations at the facility. Id. at 308. Thus, according to the Third Circuit, CPR, the railroad, had no involvement in or control over the operation of the facility. Id.

[4] It should be noted that, in the Board's decision, Hi-Tech Trans, LLC -- Petition for Declaratory Order -- Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB served August 14, 2003), the Board declared that "[t]here is no dispute that Hi-Tech's transloading activities are within the broad definition of transportation.").

Second, the license agreement expressly limited Hi-Tech to using "the Premises only for the transfer of Waste Products from truck to railcars operated by CPR." Id. at 299. Waste was the only commodity moved by Hi-Tech, from its own trucks to CPR's railcars. Thus, by the terms of the license agreement, the facility at issue was a solid waste transfer station, rather than the type of multi-commodity intermodal transload facility proposed by NET.

The commenters also rely on Borough of Riverdale -- Petition for a Declaratory Order -- The New York and Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466-0 (STB Served September 10, 1999), but the Board's analysis in that case is actually consistent with NET's position. In Riverdale, the Board was presented with the factual issue of whether a truck terminal, weigh station, and corn processing plant constructed and operated by the railroad in a residential zone constituted "transportation" subjecting it to the Board's jurisdiction. Contrary to the assertion of the commenters in this case, the Board did not deny jurisdiction but rather stated that it could "not determine from the current record whether [the corn processing facility] [was] actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that [was] related to transportation services." Id. at *6-7. Thus, if the Board had been able to determine that the facility was utilized to facilitate the transfer of the commodity [corn syrup] to rail cars, like the proposed NET facility, then the Board would have held it to be "related to transportation services."

3. NET Will Comply With All Environmental Health And Safety Requirements.

NET expressly stated in its Petition that it intends to fully comply with all substantive health and safety regulations of the Commonwealth of Massachusetts.

Petition at 15. NET listed examples of these regulations in its Petition and made it clear that this listing was not exclusive.[5] NET provided for only two exceptions: the Massachusetts regulations regarding "Site Assignment" and the regulations commonly referred to as the "Waste Ban" regulations.

MADEP does not criticize NET for not agreeing to comply with the Massachusetts Site Assignment and Waste Ban regulations. Instead, MADEP argues that because "NET has not agreed to comply with all the necessary elements of the Massachusetts State Implementation Plan, NET's proposal would be in violation of the federal Clean Air Act." MADEP at 17. This conclusion simply ignores NET's unequivocal commitment to comply with "all applicable substantive health and safety regulations." Petition at 15. Jones V.S. at ¶ 16. In addition, MADEP's comment fails to mention that NET offered, in writing, to work out an agreement that would allow MADEP to enforce NET's commitment.[6] Such a voluntary agreement would eliminate any need for the Board to involve itself in the inspection and enforcement activities that NSWMA says would be necessary. NSWMA at 11.

Unlike MADEP, NSWMA does challenge NET's positions on the Site Assignment and Waste Ban regulations. NSWMA argues that NET's non-compliance with the Site Assignment regulations would relieve it of the necessity to comply with "extensive permitting and approval processes." NSWMA at 12. However, that is

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[5] "Other substantive state health and safety regulations pertaining to NET's operations with which NET expects to comply include the following . . ." Petition at 15.

[6] See Letter from Jeffrey Porter, Counsel to NET, to Susan Ruch, MADEP (October 14, 2005), attached as an exhibit to NET's December 16, 2005 response to MADEP's and NSWMA's requests for an extension of time to file their replies.

exactly the reason the Board has preempted "preclearance" requirements like the Site Assignment regulations -- to prevent a community from imposing so many permitting requirements on a project that it is never built. Petition at 19 & n.25; see also City of Creede, CO - Petition for Declaratory Order, 2005 WL 1024483 (STB), *4, STB Finance Docket No. 34376, (STB served May 3, 2005) ("[S]tate or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use requirements) are categorically preempted.").

NSWMA also challenges NET's refusal to comply with the Waste Ban regulations, arguing that the Waste Ban regulations "conserve scarce landfill space." NSWMA at 12. However, because all of the waste materials NET intends to transport will be sent to landfills outside Massachusetts, NSWMA's argument regarding the conservation of landfill space inside Massachusetts does not apply to the facts of this case.[7]

The Board has made it clear that the ICCTA does not preempt substantive health and safety laws, including federal environmental laws, such as the Clean Air Act. Joint Petition for Declaratory Order--Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971, at *9 (STB served May 1, 2001). NET has already expressly committed that it will comply with those requirements. Petition at 15. Jones V.S. at ¶ 16. In addition, to ensure NET's commitment, the Board can make NET's

[7] It is remarkable how NSWMA claims that there are "many facilities" in Massachusetts that ship waste by rail. NSWMA at 13. However, a careful reading of the Verified Statement of Steven G. Changaris indicates that there are only two rail facilities in the Boston area that ship waste by rail. Changaris V.S. at ¶ 10.

compliance with all applicable substantive health and safety laws a condition of its exemption.[8]

4. The NET Facility Can Be Safely Constructed And Operated On The Olin Property Even If The Olin Site Is Listed On The NPL.

The Verified Statement of Margret Hanley, attached to NET's Petition, addresses the potential inclusion of the Olin Site on the National Priority List ("NPL") under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). Hanley V.S. at ¶¶30-31. CERCLA does not prohibit the redevelopment of contaminated properties that are listed on the NPL. To the contrary, the federal Environmental Protection Agency ("EPA") has developed policies and criteria that protect parties such as NET, who seek to redevelop contaminated properties in a manner that protects the public health, from certain liabilities under federal law. The criteria for the redevelopment of contaminated properties, including NPL Sites, by "Bona Fide Prospective Purchasers," are described in Title II of H.R. 2869, entitled the "Brownfields Revitalization and Environmental Restoration Act of 2001" (the "Brownfields Act"), and are substantially the same as those criteria imposed on developers and operators of contaminated properties under the MADEP Construction Policy. 42 U.S.C. §§ 9601(40) and 9607(r)(1). Specifically, the Brownfields Act requires that in order to limit liability under CERCLA, the prospective purchaser of such property must demonstrate that it has taken, or will take, steps to stop any continuing release, to prevent any future release, and to prevent or limit human, environmental, or natural resource exposure to any hazardous substance previously released. Id. In addition, the prospective purchaser must

[8] See, e.g., Mitigation Condition #38 in the Post-Environmental Assessment prepared by SEA in the prior NET proceeding.

demonstrate that it has complied with institutional controls and has granted access to parties conducting response actions. Id. Thus, to limit its potential liability under CERCLA, NET has a significant incentive to comply with these criteria.

More importantly, however, the Board has the ability to require that NET conduct all construction and operation activities in compliance with any conditions that are imposed by the federal EPA. This is what SEA proposed in the prior proceeding with respect to NET's compliance with MADEP's Construction Policy.[9] The same condition could be required in this case with respect to all conditions that might be imposed by EPA in the event that the Olin Site is listed on the NPL.[10]

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[9] See Mitigation Condition #35 in the Post-Environmental Assessment.

[10] Wilmington attached to its comments a report prepared by its environmental consultant. It should be noted that the report is in the form of a letter instead of a Verified Statement. The report does not raise any issues that are not addressed by NET in the report entitled "Response to the Town of Wilmington Comments Construction Related RAM," dated February 2005, which was incorporated by reference in the Petition. Petition at 4, n.5.

In its Reply, Wilmington attempts to associate the well documented, historical migration of DAPL to the west of the Olin Property, which occurred over thirty years ago, with the risks posed by the future operations of the NET Facility. Although certain contamination that exists in the Maple Meadow Brook Aquifer ("MMBA") is due to historical releases of wastewater at the Olin Property, the existing conditions at the portion of the Property to be developed by NET are not now affecting the conditions in the MMBA or the Wilmington wells, nor will they do so under any future use that has been proposed by NET. See Verified Statement of Margret Hanley at ¶¶ 28-32.

Conclusion

For the reasons set forth in the Petition, and for the additional reasons set forth above, NET requests that its Petition for an Exemption be granted.

Respectfully submitted,

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